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In The

Supreme Court of the United States

October Term, 1994

OKLAHOMA TAX COMMISSION,

Petitioner,

v.

CHICKASAW NATION,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Tenth Circuit

BRIEF OF AMICUS CURIAE CHEROKEE NATION IN SUPPORT OF RESPONDENT

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BRIEF OF AMICUS CURIAE CHEROKEE NATION IN SUPPORT OF RESPONDENT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The Cherokee Nation respectfully submits a Brief Amicus Curiae pursuant to Supreme Court Rule 37.3 in Support of the Respondent.

THE INTEREST OF THE AMICUS CURIAE CHEROKEE NATION

The Cherokee Nation has an interest in this action insofar as it concerns the state fuel tax issue for several

reasons. First, the Cherokee Nation shares a similar legal history with the Chickasaw Nation, being one of the five federally recognized tribes historically referred to as the "Five Civilized Tribes" (hereinafter referred to as "Five Nations.")[1] It accordingly has a strong interest in participating in any major decision which could subsequently directly or indirectly affect interpretation of the legal status of these tribes arising from their common history.

Second, the Cherokee Nation has an interest in protecting its ability to fully exercise important governmental functions. It is a strong governmental entity operating under a self-governance compact with the United States, and exercising the following governmental powers: executive functions, including operation of numerous federal programs such as its Roads and Transportation Program, and including taxation of cigarette sales; legislative functions, including development of a comprehensive code of laws; and exercise of judicial powers through its own court system.

Third, the Cherokee Nation has an interest in protecting potential tribal economic development and tax revenues. Although it is not presently operating any gas retail business, it has enacted a tribal law imposing a tax on tribal fuel sales in the event that it establishes a gas retail business in the future. A portion of this tribal revenue may be made available for law enforcement functions exercised on roads running through Indian country and

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[1] The other three of the Five Nations are the Choctaw, Seminole and Muscogee (Creek) Nations.

for construction and maintenance of roads in the Cherokee Nation's jurisdictional area to assist rural Indians and non-Indians whose needs are not currently adequately met by the state or county roads systems.

SUMMARY OF ARGUMENT

The Tenth Circuit correctly held that the legal incidence of the state fuel tax fell upon the retailer Chickasaw Nation. It also correctly applied a "per se" rule to the fuel taxation issue, finding any consideration regarding use of the tax irrelevant in its evaluation of the nature of the tax, because a "balancing of the respective tribal and state interests at stake is not relevant to a determination of the propriety of the fuel taxes." *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Commission*, 31 F.3d 964, 972 (10th Cir. 1994),[2] *cert. granted*, 130 L.Ed.2d 621, 115 S.Ct. 714 (1995).

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[2] The Tenth Circuit stated in its opinion: " . . . Here, the proceeds of the fuel tax go almost exclusively to the building and maintaining of highways in the state of Oklahoma, both within Indian country and without. This fact does not alter the nature of the fuel taxes as simple revenue measures. Because they are directed toward funding traditional government activities, the taxes fall within the ambit of the sovereignty of the tribal government. Accordingly, the district court erred in concluding that imposition of the fuel tax on the tribal retailer was not preempted by federal law. Where the state action conflicts with a power within the traditional scope of Indian sovereign authority, preemption is presumed in the absence of an explicit statement of congressional intent to the contrary. *Rice [v. Rehner]*, 463 U. S. [713] at 719-20 [(1983)]. The state has directed our attention to no such explicit grant of congressional approval of the taxation scheme here at issue and we know of none."

However, rather than advancing arguments on those two broad issues, which would likely be repetitions of the Respondent Chickasaw Nation's arguments, the Amicus Cherokee Nation will present the Court with legal authority on matters which the Court may determine to be related to the fuel tax issue, but not briefed by Respondent. The Cherokee Nation will first present the Court with a historical backdrop illustrative of the very direct manner in which Congress has always dealt with the Five Nations, and illustrative of the continued existence of important tribal governmental interests requiring the protection of this Court by application of the "per se" rule. The Cherokee Nation will then respond to assertions of Petitioner Oklahoma Tax Commission (hereinafter referred to as "Tax Commission") and the Amici South

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Chickasaw Nation v. Oklahoma ex rel., Oklahoma Tax Commission, 31 F.3d at 972 (10th Cir. 1994). Although the Tenth Circuit refers to a "presumption" of tax exemption for Indian tribes, the rule could be more accurately characterized as a "per se" rule, in light of statements by this Court in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, n. 17 (1987) that: "In the special area of state taxation of Indian tribes . . . we have adopted a per se rule . . . and the Court consistently has held that it will find the Indians' exemption from state taxes lifted only when Congress has made its intention to do so unmistakably clear . . . " It should be stressed here that state taxation is not the same thing as state regulation. See *Bryan v. Itasca County*, 426 U.S. 373 (1976) (holding that the applicability of a Public Law 280 state's civil laws in Indian country by virtue of Public Law 280 did not result in express Congressional consent to tax on reservation activities). Under the per se rule, state taxation is not permissible absent express Congressional consent, while state regulation may be allowed when state and tribal interests are balanced under the infringement test.

Dakota, California, Louisiana, Mississippi Montana, Nevada, North Dakota, Oregon, Utah, Wisconsin, and Wyoming (hereinafter referred to as "Amici States") that the Hayden-Cartwright Act does not apply to motor fuel sales by Indian tribes in Indian country.[3]

ARGUMENT

PROPOSITION I. APPLICATION OF ANY TEST OTHER THAN THE "PER SE" RULE TO THE TAX COMMISSION'S ATTEMPTS TO TAX TRIBAL ACTIVITIES WOULD BE CONTRARY TO THE JUDICIALLY RECOGNIZED SURVIVAL OF THE FIVE NATIONS' GOVERNMENTAL INTEGRITY THROUGH MORE THAN A CENTURY OF "SPECIAL" CONGRESSIONAL ENACTMENTS.

A. THE FIVE NATIONS, INCLUDING THE CHICKASAW NATION, EXERCISE FULL EXECUTIVE, LEGISLATIVE AND JUDICIAL GOVERNMENTAL POWERS.

The Tax Commission's request that the Court deviate from application of a "per se" rule of construction regarding imposition of the state fuel tax on one of the Five Nations is ironic in light of the hard-won legal battles which they have fought since the early 1800s. The Tax

[3] The Cherokee Nation agrees with Respondent Chickasaw Nation's assertion that the Hayden-Cartwright claim is not properly before this Court. However, should the Court choose to address that claim, Cherokee Nation wishes to provide the Court with arguments concerning the inapplicability of the act to fuel sales by Indian tribes in Indian country.

Commission's attempt to mislead the Court into believing that the Five Nations have only remnants of sovereignty left, based on an outdated version of Cohen's Handbook of Federal Indian Law and a 1943 decision of this Court is contrary to recent caselaw which has repeatedly recognized the sovereign strength of the Five Nations.[4]

The Tax Commission attempts to mislead the Court into believing that Congress abrogated the Treaty of Dancing Rabbit Creek, Treaty of September 27, 1830, 7 Stat. 333, by subjecting the Five Nations to Arkansas laws by the Oklahoma Organic Act, Act of May 2, 1890, ch. 182, 26 Stat. 81 and to the laws of Oklahoma Territory by the Oklahoma Enabling Act, Act of June 16, 1906, ch. 3335, 34 Stat. 267. Petitioner's Br. at 3. The Organic Act did not make the Five Nations subject to the laws of Arkansas.[5] And, as recognized by the Tenth Circuit, the

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[4] The Tax Commission cites a "1971 version of Cohen (actually a reprint of the 1942 edition) as stating that the "virtual dissolution of the tribal governments cleared the way for the creation of another state." Consistent with its confrontational approach to tribal/state relations, the Tax Commission relied on the fifty year old edition of the treatise, rather than the 1982 edition, which states that dissolution of the tribal government was not accomplished, citing *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom. *Harjo v. Andrus*, 581 F.2d 949 (DC Cir. 1978). Felix Cohen's Handbook of Federal Indian Law, Wilkinson & Strickland, Eds. (1982 Ed.) at 784.

[5] The Organic Act included extensive provisions establishing a territorial government, including territorial courts, in Oklahoma Territory, 26 Stat. 81 §§ 2-28. It also included provisions expanding the jurisdiction of the federal courts in Indian Territory. 26 Stat. 81, §§ 29-43. However, it expressly reserved criminal and civil jurisdiction over tribal members to the courts of the Five Nations. 26 Stat. 81 §§ 30, 31.

Enabling Act only transferred the nonfederal jurisdiction of the federal courts in Indian Territory to the state courts, and only applied Oklahoma territorial laws "as far as applicable":

> Two months after enacting the Five Tribes Act, Congress passed an enabling act to permit the people of the Oklahoma and Indian territories to form a state. *See* Oklahoma Enabling Act, ch. 3335, 34 Stat. 267 (1906); Enabling Act Amendment, ch. 2911, 34 Stat. 1286 (1907). The enabling act provided that federal Article III courts would succeed the special United States court in the Indian territory with respect to all cases arising under the Constitution, laws, or treaties of the United States. *See* Enabling Act Amendment, § 1, 34 Stat. at 1286-87 (amending § 16 of the Oklahoma Enabling Act). *The state courts created upon statehood were to succeed the Indian territory courts with respect to the remaining nonfederal cases. See Id.* 2, 3, 34 Stat. at 1287 (amending §§ 17 and 20 of Oklahoma Enabling Act). The enabling act also provided that "the laws in force in the Territory of Oklahoma, *as far as applicable*, shall extend over and apply to said State." Oklahoma Enabling Act, § 3, 34 Stat. at 275 (emphasis added). Finally, the enabling act preserved the authority of the federal government over Indians and their lands, and required the State to disclaim "all right and title" to such lands. *See Id.* § 1, 3, 34 Stat. at 267-68, 270.
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> * * *
>
> . . . The language of the Oklahoma [Enabling] Act, read in its historical context, suggests that Congress intended to preserve its jurisdiction and authority over Indians and their lands in

> the new state of Oklahoma until it accomplished the eventual goal of terminating the tribal governments, assimilating the Indians, and dissolving completely the tribally-owned land base – *events that never occurred and goals that Congress later expressly repudiated.* The State has failed to cite any acts of Congress that clearly reveal an intent to divest the federal and tribal governments of jurisdiction over Creek tribal lands and to confer such authority on the State of Oklahoma.
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> * * *
>
> . . . Considering Congress' clearly express intent that Creek Nation lands be set apart for the Creeks and be immune from state laws, *we believe that divestiture of that federal and tribal authority over these lands "would require an equally clear expression of congressional intent."* . . .

Indian Country U.S.A. v. Oklahoma Tax Commission, 829 F.2d 967, 974, 978-79 (10th Cir. 1987), cert. den. sub nom. *Oklahoma Tax Commission v. Muscogee (Creek Nation)*, 487 U.S. 1218 (1988) (Emphasis added).

This finding by the Tenth Circuit was reenforced in *U.S. v. Sands*, 968 F.2d 1058 (10th Cir. 1992), cert. denied, 122 L.Ed.2d 139, 113 S.Ct. 987 (1993). In that case the federal government took the incredible position on appeal, after successfully prosecuting the Indian defendant in federal court, that the federal courts had no jurisdiction over major crimes prosecutions of Indians for crimes committed in Creek Indian country. The Tenth Circuit's response was as follows:

> . . . The government's position in this case is virtually identical to that of the State of Oklahoma in *Indian Country, U.S.A.*, although the government relies on the Act of April 28, 1904 as additional support for the theory. We agree with amici Muscogee (Creek) Nation and Seminole Nation that the enactments relied on by the government did not abrogate the federal government's authority and responsibility, nor allow jurisdiction by the State of Oklahoma. Amici Brief at 9-16; *Indian Country, U.S.A.*, 829 F.2d at 978. Additionally, the government's construction of the Oklahoma Enabling Act ignores § 1 of that Act, 34 Stat. 267-78, which preserved federal authority. *Indian Country, U.S.A.*, 829 F.2d at 979.

The Five Nations have steadily dispelled the myth of their "dissolution" in cases such as *Indian Country U.S.A.* and *Sands*. Other significant cases include *Harjo v. Kleppe*, 420 F. Supp. 1110 (D.D.C. 1976), aff'd sub nom. *Harjo v. Andrus*, 581 F.2d 949 (DC. Cir. 1978), and *Muscogee Nation v. Hodel*, 851 F.2d 1439 (D.C. Cir. 1988), cert. denied, 488 U.S. 1010 (1989). In *Harjo* the executive and legislative powers of the Muscogee (Creek) Nation were found to be intact, and in *Muscogee (Creek) Nation*, the judicial powers of the Muscogee (Creek) Nation were recognized. These decisions, which interpreted many seemingly destructive federal laws shared in common by the Five Nations, resulted in the same conclusions for the other four Indian nations.

During the same time period in which the Five Nations have rebuilt recognition of their governmental powers, the Indian country status of lands within their

original domains has also been established. *Indian Country U.S.A.*, supra (unallotted tribal fee lands); *State v. Klindt*, 782 P.2d 401 (Ok. Cr. 1989), *State v. Brooks*, 763 P.2d 707 (Ok. Cr. 1988), cert. denied, 490 U.S. 1031 (1989), *U.S. v. Sands*, supra, *Cravatt v. State*, 825 P.2d 277 (Ok. Cr. 1992) (restricted allotted lands); *Housing Authority of Seminole Nation v. Harjo*, 790 P.2d 1098 (Okla. 1990) (Indian housing property constituting dependent Indian community). These cases resulted in the establishment of tribal or "CFR" court systems for the Five Nations.[6]

B. THE FIVE NATIONS HAVE A SIGNIFICANT GOVERNMENTAL INTEREST IN STATE ROADS.

The Five Nations made a significant contribution to Oklahoma roads at the time of statehood, The Five Tribes Act, Act of April 26, 1906, ch. 1876, 37 Stat. 137, 146, provides:

> Sec. 24. That in the Choctaw, Chickasaw, and Seminole Nations public highways or roads two rods in width, being one rod on each side of the section line, may be established on all section lines; and all allottees, purchasers, and others shall take title to such land subject to this provision, and if buildings or other improvements are damaged in consequence of the establishment of such public highways or roads, such damages accruing prior to the inauguration of a

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[6] Two of the Five Nations by choice use a "CFR" court system operated by the Bureau of Indian Affairs pursuant to 25 CFR Part 11, while the other three maintain courts operated by the tribes themselves.

> State government shall be determined under the direction of the Secretary of the Interior and be paid for from the funds of said tribes, respectively.
>
> All expenses incident to the establishment of public highways or roads in the Creek, Cherokee, Choctaw, Chickasaw, and Seminole Nations, including clerical hire, per diem, salary, and expenses of viewers, appraisers, and others, shall be paid under the direction of the Secretary of the Interior from the funds of the tribe or nation in which such public highways or roads are established . . . [7]

The Oklahoma Constitution, Article 16, § 2, contains the following related provision:

> The State of Oklahoma hereby accepts all reservations and lands for public highways made under any grant, agreement, treaty, or act of Congress: Provided, This section shall not be construed to prejudice the vested rights of any tribe, allottee, or other person to any such land.[8]

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[7] A provision similar to § 4 is contained in Section 37 of the Cherokee Allotment Agreement, Act of July 1, 1902, 32 stat. 716, 722. According to state interpretations, § 4 was prospective and did not authorize state authorities to take for road purposes, without compensation, those Indian lands which had been allotted prior to the passage of the 1906 Act. *Dudley v. Meggs*, 153 P. 1121 (OK. 1915); *Good v. Keel*, 116 P. 777 (OK. 1911).

[8] The Oklahoma Supreme Court has held that this provision is "merely declaratory of the law as it already existed, as such acceptance could have no effect, where private rights and interests had attached to such lands before the adoption of such provision." *Mills v. Glascock*, 110 P. 377, 379 (OK. 1910).

Tribal members have contributed through payment of the state gross production tax by express Congressional directive subjecting mineral estates in Five Nations restricted property to the tax. Act of May 10, 1928, ch. 517, 45 Stat. 495, 496, § 6. A significant percentage of the gross production tax revenues levied on oil, gas and minerals is included as a funding source for the State General Revenue Fund, which is used for state roads purposes along with federal contributions and special state highway funds. 68 O.S. § 1004a(B). Counties with oil, gas and minerals resources also receive 10% of the gross production tax revenue attributable to their counties for deposit in the county highway funds. 68 O.S. § 1004(3), 1004a(A). Since some portions of eastern Oklahoma have historically enjoyed very lucrative oil and gas production, the Five Nations have made a substantial contribution to state revenues not shared by other tribes.[9]

The Cherokee Nation is actively exercising its governmental interest in roads in Indian country. Federal

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[9] The 1928 act addressed Congressional concerns which were stated only four years before its passage, during discussions concerning Oklahoma non-taxable allotted Indian lands at hearings concerning federal highway funding. At the hearings, Congressman Manlove posed the following question: "Upon what basis would the Government be charged [for roads] in the case of lands in northeast Oklahoma, which, by reason of oil wells and large zinc mines, have a special value? Those oil and zinc properties are nontaxable under a late ruling, for income tax purposes, or otherwise. On what basis would the Government be charged in the case of those lands?" Roads Hearings Before the Committee on Roads, House of Representatives, 68th Cong., 1st Sess, on H.R. 8885 and H.R. 8907 (April 25, 1924) at 3 (hereinafter referred to as "Roads Hearings").

highway legislation expressly provides that the Indian Self-Determination and Education Assistance Act applies to all funds appropriated for the construction and improvement of Indian reservation roads and administered by the Secretary of Interior. 23 U.S.C. § 204. Following the advent of Self-Governance, now a permanent federal program established in 25 U.S.C. § 450 *et seq.*, by Pub. Law 103-413, Act of October 25, 1994, 108 Stat. 4250, the Cherokee Nation and other tribes have compacted for tribal administration of the Indian roads program.[10]

The Cherokee Nation, and the other four tribes, also have an important governmental interest in law enforcement on the roads. While the jurisdictional status of roads running through Indian country in eastern Oklahoma has not been litigated, some cases in other states have found a lack of state jurisdiction over such roads in certain

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[10] In the 1994 fiscal year, more than $17.5 million in federal funds were allocated to the Bureau of Indian Affairs and/or Indian nations in Oklahoma for roads projects pursuant to 23 U.S.C. § 202. The Cherokee Nation alone had federal roads funding in the amount of more than $4 million for its 1994 fiscal year for its roads program, administered by its Transportation and Roads Program as authorized by a compact between the Nation and the federal government. "Addendum to FY 1994 Annual Funding Agreement Between Cherokee Nation and the United States (Department of Interior)" executed pursuant to the Indian Self-Determination Act, 25 U.S.C. 450f. Prior to the administration of this funding by the Nation, federal roads funding for the fourteen county area within the geographic boundaries of the Cherokee Nation were administered by the Bureau of Indian Affairs. On a national scale, the Federal Highway Administration had $191 million allocated for the Indian roads in FY 1994. This funding is used for public roads located within or leading to Indian country or an Indian community, traveled by non-Indians and Indians alike.

circumstances.[11] Although the Oklahoma Highway Patrol generally exercises law enforcement functions on state roads, Indian tribes often share this responsibility through cross-deputization agreements. Since the motor fuel tax deposited in the State General Fund is used in part to support state police, it is logical that the Five Nations should access tribal tax revenues for law enforcement on highways in Indian country, a function beneficial both to Indian and non-Indian users of such highways.[12]

PROPOSITION II. THE HAYDEN-CARTWRIGHT ACT DOES NOT APPLY TO FUEL SALES BY THE FIVE NATIONS ON INDIAN COUNTRY.

Both Petitioner and Amici States argue that the Hayden-Cartwright Act, codified at 4 U.S.C. § 104, authorizes the state to impose motor fuel taxes on sales to all persons within Indian Country. Petitioner should be precluded from raising this issue now because it was not raised at the trial level and was not raised in the appeal to

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[11] *Schantz v. White Lightning*, 502 F.2d 67 (8th Cir. 1974) (Indian cannot be sued in federal court for negligence in causing a car accident on a public highway within Indian country); *U.S. v. Harvey*, 701 F.2d 805 (9th Cir. 1983), reh'g denied, 711 F.2d 144 (9th Cir. 1983). (State police lack authority to arrest an Indian driving while intoxicated on a United States highway built on a state right-of-way through Indian land).

[12] Four of the Five Nations have adopted tribal laws which impose tribal taxes replacing the state fuel tax. Chickasaw Nation Law 11-011 (August 11, 1994), Choctaw Nation Bill 163-94 (August 13, 1994) Seminole Law 94-13 (September 3, 1994) and Cherokee Nation Legislative Act 8-94 (December 12, 1994).

the Tenth Circuit. However, Amicus Cherokee Nation wishes to respond, should this Court determine consideration of this issue appropriate.

The Hayden-Cartwright Act was first enacted as Public Law 74-686, Act of June 16, 1936, ch. 582, § 10, 49 Stat. 1519, 1521-22 (1936), was reenacted by Act of July 30, 1947, ch. 389, 61 Stat. 644, and was amended to include Guam as a "territory" as used in the Act, by the Act of August 1, 1956, ch. 827, 70 Stat. 799. In its present form it provides:

> (a) All taxes levied by any State, Territory, or the District of Columbia upon, with respect to, or measured by, sales, purchases, storage, or use of gasoline or other motor vehicle fuels may be levied, in the same manner and to the same extent, with respect to such fuels *when sold by* or through post exchanges, ship stores, ship service stores, commissaries, filling stations, licensed traders *and other similar agencies*, located on *United States military or other reservations*, when such fuels are not for the exclusive use of the United States. Such taxes, so levied, shall be paid to the proper taxing authorities of the State, Territory, or the District of Columbia, within whose borders the reservation affected may be located.
>
> (b) The *officer in charge of such reservation* shall, on or before the fifteenth day of each month, submit a written statement to the proper taxing authorities of the State, Territory, or the District of Columbia within whose borders the reservation is located, showing the amount of such motor fuel with respect to which taxes are

payable under subsection (a) for the preceding month.

(c) As used in this section, the term "Territory" shall include Guam.

4 U.S.C. § 104.

Amici States argue that the Act's reference to "United States military and other reservations" and to "licensed traders" demonstrates a Congressional intent to authorize state fuel taxes against Indian tribes selling fuel in Indian country. There are a number of flaws in this reasoning.

The primary flaw is the fact that the Act imposes a tax when fuel is sold by certain specified "agencies," including "licensed traders." Even if Congress had intended to impose a tax on sales by "licensed traders" located on "reservations", the Act does not impose a tax on sales *by Indian tribes*. This is an important distinction. "[S]tatutes passed for the benefit of dependent Indian tribes . . . are to be liberally construed, doubtful expressions being resolved in favor of the Indians." *Bryan v. Itasca County*, 426 U.S. 373 (1976). "This principle of statutory construction has particular force in the face of claims that ambiguous statutes abolish by implication Indian tax immunities." *Id* at 392, citing *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 174 (1973), *Squire v. Capoeman*, 351 U.S. 1, 6-7 (1956); *Carpenter v. Shaw*, 280 U.S. 363, 366-67 (1930). "This is so because Indians stand in a special relation to the federal government from which the states are excluded unless the Congress has manifested a clear purpose to terminate [a tax] immunity and allow states to treat Indians as part of the general community." *Id* at 392 (bracketed "a tax" included in text of *Itasca*

case), citing dissent in *Oklahoma Tax Comm'n v. United States*, 319 U.S. 598, 13-614 (1943).[13]

Another fatal flaw is that Congress did not expressly reference Indian lands in the Hayden-Cartwright Act, merely referring to "United States military and other reservations."[14] When the Hayden-Cartwright Act was

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[13] Although not essential to its argument, Amicus Cherokee Nation is also curious as to the State's interpretation of provisions in the Act placing reporting requirements on "the officer in charge of the reservation," a term which does not remotely refer to any tribal official or employee responsible for fuel sales operations. It is elementary that statutory language must be read so as to be consistent with the legislative intent and not to interpret the words of the statute so as to lead to absurd results. *Monamotor Oil Co. v. Johnson*, 3 F. Supp. 189 (1933), aff'd 292 U.S. 86 (1934). If the Hayden-Cartwright Act applied to fuel sales by tribes in Indian country, who would the federal "officer in charge of the reservation" be? The Cherokee Nation no longer has a BIA agency or an agency superintendent. Its government deals directly with the BIA central office on a government to government basis.

[14] Although the definition of "Indian country" was not codified at 18 U.S.C. § 1151 until 1948, judicial definitions had already carried the definition of Indian country beyond "reservations", to include trust and restricted allotments, as well as dependent Indian communities. See *Bates v. Clark*, 95 U.S. 204 (1877) (land held in "original" Indian title is Indian country); *Donnelly v. United States*, 228 U.S. 243 (1913) (Indian reservations set apart out of the public domain constitute Indian country) *U.S. v. Sandoval*, 231 U.S. 28 (1913) (lands owned in fee by Indian tribe constitute Indian country); *U.S. v. Pelican*, 232 U.S. 442 (1914) (trust allotment is Indian country); *U.S. v. Ramsey*, 271 U.S. 467 (1926) (restricted allotment is Indian country). If Congress had been concerned with a lack of revenues from Indian country lands, it would have expressly included Indian trust and restricted allotments in the Hayden-Cartwright Act, rather

enacted in 1936, the State of Oklahoma and federal officials were still laboring under the false premise that there was no Indian country in Oklahoma.[15] In light of this fact, it is difficult to infer a Congressional intent to impose the taxation requirement on the Five Nations by a vague 1936 reference to "other reservations" almost sixty years later, after the tribes through hard-won legal battles have finally established judicial recognition of the Indian country status of their property and recognition of their governmental authority.

The Amici States' partial review of the legislative history of federal highway legislation is also flawed and contradictory to the States' position. Amici States apparently attempt to show that this legislation indicates congressional concern with the tax-exempt status of Indian lands, and that this concern finally lead to the "reservation" language in the Hayden-Cartwright Act. The flaw in their argument is that Congress has historically had no trouble being specific and saying exactly what it means when referencing Indian lands in any manner.[16]

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than the simple reference to "other reservations" contained in the Act.

[15] It was not until 1989, in *State v. Klindt*, 782 P.2d 401 (Okla. Cr. 1989), that the Oklahoma Court of Criminal Appeals overruled an earlier decision that the state had jurisdiction to prosecute a murder committed on a Choctaw restricted allotment, *Ex Parte Nowabbi*, 61 P.2d 1139 (Ok. Cr. 1936), based on a finding that a restricted Choctaw allotment was not an "Indian reservation." See also *United States v. Sands*, 968 F.2d 1058 (10th Cir. 1992), *cert. denied*, 122 L.Ed.2d 139, 113 S.Ct. 987 (1993).

[16] The Federal Highway Act, 23 U.S.C. § 101, includes the following definitions containing specific descriptions of types of Indian lands affected: "The term "public lands highways"

The federal highway legislation is a good example of Congressional ability to describe types of Indian lands to be covered, and demonstrates that Congress's method of dealing with Indian reservations and nontaxable Indian lands was through the federal highway legislation, not through the Hayden-Cartwright Act, which was not part of the federal highway legislation. The Amici States' discussion of the legislative history of federal highway legislation, which included special funding provisions for "nontaxable Indian lands, individual and tribal," demonstrates that Congress knew the distinction between Indian reservations and nontaxable Indian lands.[17] In

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means those main highways through unappropriated or unreserved public lands, *nontaxable Indian lands*, or other Federal reservations, which are on the Federal-aid systems . . . The term "Federal lands highways" means forest highways, public lands highways, park roads, parkways and Indian reservation roads which are public roads . . . The term "Indian reservation roads" means public roads that are located within or provide access to an *Indian reservation or Indian trust land or restricted Indian land* which is not subject to fee title alienation without the approval of the Federal Government, or Indian and Alaska native villages, groups, or communities in which Indians and Alaskan Natives reside, whom the Secretary of the Interior has determined are eligible for services generally available to Indians under Federal laws specifically applicable to Indians.

[17] For example, the Act of May 21, 1928, ch. 660, 45 Stat. 683, provided for special federal funding for "any State containing unappropriated public lands and nontaxable Indian lands, individual and tribal, exceeding 5 per centum of the total area of all lands in the States in which the population, as shown by the latest available Federal census, does not exceed ten per square mile of area." Subsequent acts continued to authorize the additional funding in states having such lands, always using the language "nontaxable Indian lands, individual and tribal." Act

fact, as demonstrated by the following exchange during congressional hearings in 1924, "Roads Hearings" at 2, members of Congress recognized a distinction between Indian reservation and nontaxable Indian lands in Oklahoma as follows:

> Mr. Carter. * * *
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> Now, take the State of Oklahoma, for instance, you will find on the east side of the State that we have 40 counties, formerly known as the reservations of the Five Civilized Tribes. There are about 19,500,000 acres of land on that side of the State, comprising the 40 counties, and about 16,000,000 acres of that land has been allotted to enrolled members of the five tribes and is nontaxable – some for 21 years and some in perpetuity – so that in the beginning we had only 3,500,000 acres of land in those 40 counties out the 19,500,000 acres which could be taxed.
>
> That condition, of course, very greatly hampered the building of roads in our State, and we would like to have the same benefits to apply to nontaxable Indian lands as are applied to unappropriated public lands. They stand exactly upon the same basis, since the Federal Government has exempted those lands from taxation. The unappropriated public lands, of course, belong to the Nation, and they are not taxable. The Indian lands are usually exempted from taxation by treaty, or if not by treaty, by law. . . .

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of December 20, 1944, ch. 626, 58 Stat. 838, § 5(a); Public Law 85-767, Act of August 27, 1958, 72 Stat. 885, § 120(a); Public Law 90-495, Act of August 23, 1968, 82 Stat. 815, § 34.

* * *

Mr. Robison. When the act of November 9, 1921,[18] was considered, that question was raised in conference, but somebody made the point that the Department of the Interior had a special appropriation with which they build roads through Indian reservations.

Mr. Hudspeth. That would not apply to this situation, because these lands are not in Indian reservations.

MR. CARTER. In our case and in many other cases the lands are already allotted. It ceases to be a reservation when the lands are allotted, and the lands become merged with the balance of the lands of the State, but they still remain nontaxable.

MR. ROBISON. There is an appropriation provided to take care of road building in Indian reservations, but your point is that the lands have been taken from the reservation status and have been allotted. They have been taken out of the reservation, but are non-taxable, and there is no way to reach them.

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[18] Congressman Robison was referring to the Federal Highway Act of November 9, 1921, 42 Stat. 212. Separate federal funds have historically been appropriated for "Indian reservation roads" pursuant to that law, as amended by Act of June 24, 1930, 40 Stat. 805, by federal appropriations legislation. See Act of June 18, 1934, 48 Stat. 992, § 6; Act of June 16, 1936, ch. 582, 49 Stat. 1519; Act of June 8, 1938, ch. 328, 52 Stat. 633, § 9. Separate appropriations have also been made for unappropriated or unreserved public lands and "nontaxable Indian lands." See 52 Stat. 633, § 6.

This 1924 exchange shows that when Congress enacted the Act of February 12, 1925, ch. 219, 43 Stat. 889, 890, to include the terms "nontaxable Indian lands, individual and tribal," to federal laws already providing additional federal funding to states with unappropriated public lands, it knew the distinction between "Indian reservations" and other types of Indian lands.[19] Knowing that distinction, it chose to use the term "other reservations" a few years later in the Hayden-Cartwright Act. Thus, while congressional intent in the federal highway legislation was to provide supplemental *federal* funds for roads in Indian reservations and nontaxable Indian lands, its intent in the Hayden-Cartwright Act was to require "agencies" (not Indian tribes) selling fuel on non-Indian "United States" reservations (not Indian reservations) to pay state motor fuel taxes. It is not logical to assume otherwise.

Amici States incorrectly state in their Brief, p. 6, fn 2, that "Felix Cohen agreed with the Department of Interior's administrative ruling in his seminal treatise, as did the subsequent revisions of that treatise." As noted in the forward, p. V of the 1971 University of New Mexico reprint of the original 1942 edition of the handbook, the 1958 edition cited by Amici States was a revision by the Bureau of Indian Affairs to better serve its termination policy. The 1982 edition states that the legislative history

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[19] The Amicus Cherokee Nation does not necessarily agree with the congressional perception that Indian reservations no longer exist in Oklahoma. However, the discussion in the 1924 hearings plainly demonstrates the congressional understanding that there is a distinction between "Indian reservations" and Indian allotments.

of the Hayden-Cartwright Act contains no congressional understanding that "Indian reservations" were intended to be included, and simply notes without comment the Interior Solicitor's interpretation of the law.[20] For the reasons already stated herein, the Interior Solicitor's conclusion does not apply to the Five Nations.

As a final note, the Hayden-Cartwright Act must be considered in light of the Preamble of the Oklahoma

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[20] See 57 I.D. 129 (1940). The 1982 edition states: " . . . In passing this statute *Congress did not consider its possible application to transactions involving reservation Indians.* The tax authorization was first passed as part of a 1936 highway construction statute, and other sections of the Act refer to Indian reservation roads. Act of June 16, 1936, ch. 582, §§ 3, 6, 49 Stat. 1519, 1520, 1521. But the tax authorization was not part of the initial bill that passed the House and cleared the appropriate Senate committee. H.R. 11687, 74th Cong. 2d Sess (1936). See 80 CONG. REC. 5613, 6408 (1936). Thus, the committee reports make no reference to it. H.R. REP. NO. 2371, 74th Cong. 2d Sess. (1936); S. REP. No. 1976, 74th Cong. 2d Sess. (1936). A separate bill proposing the tax authorization had been introduced in the House H.R. 3660, 74th Cong. 2d Sess. (1936). When the highway bill came before the full Senate, the provisions of H.R. 3660 were added as a floor amendment, 80 CONG. REC. 6913 (1936). There is no separately published history on H.R. 3660, and the subsequent Conference Report on Cong. 2d Sess. 1 (1936). *During final debate, a House member described the tax section as dealing with a problem in "post-exchange stores and on Government reservations."* 80 CONG. REC. 8701 (1936) (Mr. Whittington). See also id. (Senate) . . . The *Interior Solicitor has concluded* that the statute does not authorize state taxation of fuel purchased by a tribal enterprise to operate a tribal sawmill but does authorize state taxation of retail sales by the tribal enterprise, both to Indians and to other person. 57 Interior Dec. 129 (1940)." *Felix Cohen's Handbook of Federal Indian Law*, (Strickland and Wilkinson, Ed., 1982), p. 412, fn 62 (emphasis added).

Enabling Act, Act of June 16, 1906, 37 Stat. 267, which expressly recognizes that the establishment of the State of Oklahoma would not impair Indian rights or federal authority regarding Indian rights as follows:

> . . . Provided, That nothing contained in the said constitution shall be construed to limit or impair the rights of person or property pertaining to the Indians of said Territories (*so long as such rights shall remain unextinguished*) or to limit or affect the authority of the Government of the United States to make any law or regulations respecting such Indians, their lands, property, or other rights by treaties, agreement, law, or otherwise, which it would have been competent to make if this act had never been passed. . . .

The phrase "so long as such rights shall remain unextinguished" obviously does not refer to extinguishment by the state. It can only refer to express extinguishment by Congress. Congress did not extinguish Five Nations treaty protections against applicability of state laws by enactment of the Hayden-Cartwright Act.

CONCLUSION

The Oklahoma Tax Commission is one of the last bastions of state resistance to the legal and physical reality of the presence of the Five Nations in eastern Oklahoma. Their actions are inconsistent not only with the

governmental status of the Five Nations, but also with state policies recognizing tribal sovereignty.[21]

In 1994 the Oklahoma State Senate enacted Enrolled Senate Concurrent Resolution No. 62, which established the Oklahoma State-Tribal Economic Development Task Force, to evaluate federal, state, tribal and private resources available for economic development; to identify jurisdictional barriers which hinder economic development efforts; to recommend methods for establishing an effective, mutually beneficial effort for developing joint state-tribal economic activities; and to file a report on findings and proposed legislative recommendations of the task Force with the Governor and the Legislature.

The resulting report, State of Oklahoma SCR 62, Oklahoma State Tribal Economic Development Task Force, December 1994 (hereinafter referred to as "Task Force Report"), included findings that the following matters are a barrier to progress: continuing litigation regarding tribal taxation and other state-tribal issues and the acceptance of erroneous information that is either under-

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[21] Although the Tax Commission repeatedly refused to negotiate with the Five Tribes concerning taxation of cigarettes in Indian country, in 1993 the Five Tribes successfully negotiated a compact with state legislative staff, approved by the Governor of Oklahoma, which has resulted in the economic benefit of both parties to the compact. See also Tribal/State Relations Act, 74 O.S. § 1222 (establishing Oklahoma State/Tribal Relations Committee with authority to approve tribal/state intergovernmental agreements, subject to Governor's approval); and 12 O.S. § 728 (providing for state/tribal reciprocity in recognition of state and tribal court orders).

represented, over-represented or misrepresented in relation to tribal impact on state revenue. Task Force Report at 6, 7. The report includes in its recommendations that the state employ an attorney that is trained in or specializes in Indian law as a resource for the Governor's office, who could also be used by the Tax Commission to avoid "unnecessary litigation that is costly to both the States and tribes." Task Force Report at 9.

The Tax Commission's purported concerns about the effect of application of a per se rule in this action on state revenues is irrelevant and obviously not shared by other state officials. Its untimely effort to seek a finding of applicability of the Hayden-Cartwright is a characteristic last-ditch effort to save face. These desperate measures of the Tax Commission should not be allowed by the Court. Amicus Cherokee Nation accordingly respectfully requests that the judgment of the Tenth Circuit Court of Appeals be affirmed.

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